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case.

ATTORNEY FOR APPELLANT:

**JAKE WARRUM**  
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**GARY DAMON SECREST**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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GERALD OSBORNE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 65A05-0606-CR-300
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE POSEY SUPERIOR COURT  
The Honorable Brent Almon, Judge  
Cause No. 65D01-0510-CM-433

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**January 31, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Gerald Osborne appeals his conviction of conversion as a Class A misdemeanor after a bench trial. We affirm.

## **Issues**

Osborne raises two issues, which we restate as:

- I. whether there is sufficient evidence to support his conviction; and
- II. whether the State met its burden of disproving his mistake of fact defense.

## **Facts**

In 2003, Jeremy Scott Barnes and his father, Roger, established Hoosier Rent to Own, LLC, (“Hoosier”) as a small, family-owned and operated business in Mt. Vernon. Both men had other full-time jobs, and they hired Osborne to manage Hoosier in early 2005. In this position, Osborne was responsible for handling the day-to-day operations of a rent-to-own store. His responsibilities included running the store, making calls to customers, and making bank deposits. He had the authority to make purchases for the business at Alles Brothers and Bud’s Hardware because the store had credit accounts at those stores and to use the petty cash fund for purchases such as gas. However, Osborne did not have the authority to withdraw money from the store’s bank account.

At some point in 2005, Jeremy’s mother and Roger’s wife, Lorelei, was looking over the store’s bank statements when she noticed deductions from the bank account that she did not recognize. She called the bank to inquire about the deductions, and was told that they represented automatic withdrawals for payments to America On-line (“AOL”).

Lorelei called AOL to see who had authorized automatic payment for the accounts, but AOL refused to give her any information. The Barneses eventually filed a police report and subpoenaed AOL's records.

Although Osborne denied setting up or using the AOL accounts, the Barneses eventually learned from the subpoenaed records that Osborne and his wife had set up two AOL accounts and used automatic withdrawal from Hoosier's bank account to pay for them. During a police interview in August 2005, Osborne admitted that he had set up the AOL accounts and the automatic payments. However, he claimed that he had the authority to make these transactions because he was the manager of Hoosier.

The State charged Osborn with conversion as a Class A misdemeanor. At trial, Roger and Jeremy testified that no one gave Osborne consent to set up the AOL accounts. Also at trial, Osborne testified that: 1) he knew the Barneses had cancelled Hoosier's prior internet service because the former manager was abusing it; 2) he got the bank account number to set up the accounts from the store's bank deposit slips; 3) he set up the accounts in his name; 4) none of the screen names he used, including mykid287, grlv2tpus, and shineyfoil, identified the business; and 5) he never told the Barneses that he had set up the accounts so that they could use them. The trial court convicted Osborne as charged, and he appeals.

## **Analysis**

### ***I. Sufficiency of the Evidence***

Our standard of review for sufficiency of the evidence claims is well settled. Stokes v. State, 801 N.E.2d 1263, 1271 (Ind. Ct. App. 2004), trans. denied. We neither

reweigh the evidence nor assess the credibility of witnesses. Id. Rather, we consider only the evidence most favorable to the judgment, along with all reasonable and logical inferences that can be drawn therefrom. Id. If there is substantial evidence of probative value to support the conviction, we will affirm. Id.

Indiana Code Section 35-43-4-3(a) defines conversion as “knowingly or intentionally exert[ing] unauthorized control over the property of another person . . . .” Indiana Code Section 35-43-1-1 explains that a person’s control over property of another person is unauthorized when it is exerted either without the other person’s consent or in a manner or to an extent other than that to which the other person has consented.

Osborne contends there is insufficient evidence that the control he exerted over Hoosier’s bank account in setting up and paying for the AOL accounts was unauthorized. Rather, according to Osborne, he “had authority to act for and on behalf of Hoosier Rent to Own based on his employment as store manager.” Appellant’s Br. p. 6.

The evidence most favorable to the judgment reveals that Hoosier’s owners, the Barneses, did not give Osborne consent to either open the AOL accounts or to pay for them with automatic deductions from Hoosier’s bank account. Further, although Osborne was Hoosier’s manager, he was only authorized to make purchases at the two stores where Hoosier had credit accounts and to use the petty cash for purchases such as gas. He did not have the authority to withdraw money from Hoosier’s bank account. This evidence supports both the trial court’s conclusion that Osborne’s transactions were unauthorized as well as Osborne’s conviction for conversion.

## *II . Mistake of Fact Defense*

Osborne further argues that “even if [his] conduct exceeded the owners’ consent, [he] was reasonably mistaken about his authority as manager.” Appellant’s Br. p. 8. According to Osborne, he “honestly believed that he had the authority to set up the AOL account[s].” Appellant’s Br. p. 9.

Pursuant to Indiana Code Section 35-41-3-7, a mistake of fact defense “is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense.” When the State has made a prima face case of guilt, the burden is on the defendant to establish an evidentiary predicate of his mistaken belief of fact, which is such that it could create a reasonable doubt in the fact-finder’s mind that the defendant acted with the requisite mental state. Saunders v. State, 848 N.E.2d 1117, 1121 (Ind. Ct. App. 2006), trans. denied.

The State retains the ultimate burden of proving beyond a reasonable doubt every element of the charged crime, including culpability or intent, which would in turn entail proof that there was no reasonably held mistaken belief of fact. In other words, the State retains the ultimate burden of disproving the defense beyond a reasonable doubt. Id. The State may meet its burden by directly rebutting evidence, by affirmatively showing that the defendant made no such mistake, or by simply relying upon evidence from its case-in-chief. Id.

Whether Osborne made a mistake of fact is a question of fact for the finder of fact. Id. On appeal, we review the issue by the same standard applied when sufficiency of the

evidence is challenged. Id. That is, we do not reweigh the evidence or judge the credibility of witnesses, and we uphold the conviction if there is substantial evidence of probative value to support it. Id.

The evidence most favorable to the judgment reveals that Osborne denied setting up or using the AOL accounts and using Hoosier's bank account to pay for them until confronted with the subpoenaed information that he had set up the accounts. He then changed his story and told the police that he had the authority to set up the accounts because he was Hoosier's manager. Osborne later admitted that: 1) he got the bank account number to set up the accounts from the store's bank deposit slips; 2) he set up the accounts in his name rather than that of the business; 3) none of the screen names he used, including mykid287, grlv2tpus, and shineyfoil, identified the business; and 4) he never told the Barneses that he had set up the accounts so that they could use them. This evidence supports the trial court's conclusion that Osborne knew he lacked the authority to set up the AOL accounts using Hoosier's funds. The State met its burden of disproving Osborne's mistake of fact defense.

### **Conclusion**

There is sufficient evidence to support Osborne's conversion conviction, and the State met its burden of disproving his mistake of fact defense. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.